

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 339

NEW HAMPSHIRE FIRE INSURANCE CO.,
PETITIONER,

vs.

SCANLON, DISTRICT DIRECTOR OF
INTERNAL REVENUE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 22, 1959

CERTIORARI GRANTED NOVEMBER 9, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 339

NEW HAMPSHIRE FIRE INSURANCE CO.,
PETITIONER.

vs.
SCANLON, DISTRICT DIRECTOR OF
INTERNAL REVENUE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INDEX

Original-Print

Proceedings in the U.S.C.A. for the Second Circuit		
Appendix to appellant's brief consisting of the record from the U.S.D.C. for the Southern Dis- trict of New York	A	A
Docket entries	1	1
Order to show cause and petition	2	2
Affidavit of Assistant United States Attorney in opposition to motion to quash notices of levy	11	11
Affidavit of A. Foreman on behalf of Acme Cassa, Inc.	13	13
Order dismissing petition, Cashin, J.	14	14
Opinion, per curiam	17	17
Judgment	19	19
Clerk's certificate (omitted in printing)	21	19
Order allowing certiorari	22	20

[fol. A]

[File endorsement omitted]

**IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Case No. 25635

NEW HAMPSHIRE FIRE INSURANCE COMPANY,
Petitioner-Appellant,

—vs.—

THOMAS F. SCANLON, District Director of Internal Revenue,
CITY OF NEW YORK and ACME CASSA, Inc., Respondents-
Appellees.

**On Appeal From the United States District Court
for the Southern District of New York**

APPELLANT'S APPENDIX**Docket Entries**

Mar. 4, 1959—Complaint Filed and Summons Issued (Should be Order to Show Cause and Petition Filed and Served).

Mar. 17, 1959—Filed Show Cause Order to Quash Notices of Levy. Returnable 3/31/59.

Apr. 16, 1959—Filed Affidavit of A. Foreman (Acme Cassa, Inc.) Supporting Motion of Plaintiff New Hampshire.

Apr. 16, 1959—Filed Opposing Affidavit to Quash Levy.

Apr. 16, 1959—Filed Copy of Opinion, No. 25,045, Petition Dismissed. It is so Ordered. Cashin, J. Judgment Entered. Clerk Mailed Notice of Entry.

Apr. 21, 1959—Filed Notice of Appeal. Mailed Copies to U. S. Attorney, Charles H. Tenney, M. Carl Levine, Morgulas & Foreman.

Order to Show Cause and Petition**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK**

NEW HAMPSHIRE FIRE INSURANCE
COMPANY,

Petitioner,

—against—

THOMAS E. SCANLON, District Director of
Internal Revenue, CITY OF NEW YORK,
and ACME CASSA, INC.,

Respondents.

Upon the annexed petition of New Hampshire Fire Insurance Company, together with the Exhibit attached thereto,

Let respondents, Thomas E. Scanlon, District Director of Internal Revenue; City of New York, and Acme Cassa, Inc., and each of them, show cause at a Motion Term of this Court to be held in Room 506 of the United States Courthouse, Foley Square, New York 7, New York, on the 31st day of March, 1959, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be granted herein, quashing the Notice of Levy No. B-970 dated October 16, 1957 and the Notice of Levy No. B-978 dated October 23, 1957 and the Notice of Levy No. B-1241 dated February 21, 1958 and the Notice of Levy (no number) dated May 20, 1958, heretofore served upon and filed with respondent City of New York at various times between November 1,

Order to Show Cause and Petition

1957 and May 21, 1958, inclusive, insofar as said Notices of Levy restrained and prohibited the respondent City of New York to deliver to New Hampshire Fire Insurance Company, its warrant No. 228268 in the sum of \$68,015.50 due since November 26, 1957 as a partial payment under a written contract between the respondent Acme Cassa, Inc. and the respondent City of New York, known as Contract No. B-254-155 (Comptroller's No. 182559) and which is the property of New Hampshire Fire Insurance Company.

Sufficient reason appearing therefor, it is

ORDERED that service of a copy of this Order to Show Cause, together with the Petition and Exhibit annexed thereto, upon each of the respondents in the manner provided by the Federal Rules of Civil Procedure on or before March 25th, 1959, shall be deemed good and sufficient service.

Dated, New York, N. Y.
March 4, 1959.

s/ DAVID N. EDELSTEIN
United States District Judge

Order to Show Cause and Petition

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NEW HAMPSHIRE FIRE INSURANCE
COMPANY,

Petitioner,

—against—

THOMAS E. SCANLON District Director of
Internal Revenue, CITY OF NEW YORK,
and ACME CASSA, INC.,

Respondents.

The petitioner, New Hampshire Fire Insurance Company, for its petition respectfully shows:

1. At all times hereinafter mentioned, petitioner was engaged in the business of acting as a compensated surety having its principal place of business at 1750 Elm Street, City of Manchester, State of New Hampshire (hereinafter referred to as "New Hampshire").

2. At all times hereinafter mentioned, the respondent City of New York (hereinafter referred to as "City") was and now is a Municipal Corporation organized and existing under the laws of the State of New York.

3. At all times hereinafter mentioned, The Department of Parks of the City of New York was and is now a fully constituted Department of the City.

4. At all times hereinafter mentioned, the respondent Acme Cassa, Inc. (hereinafter referred to as "Acme Cas-

Order to Show Cause and Petition

sa") is a domestic corporation, organized under the laws of the State of New York, having its principal place of business at 66 Wyandanch Avenue, Babylon, New York.

5. This action arises under the Internal Revenue Laws of the United States, more particularly, 28 U. S. C. §§ 1340, 2463 and also under 26 U. S. C. § 6321, et seq.

6. On or about June 21, 1956, Acme Cassa entered into a written contract bearing No. B254-155 Comptroller's No. 182559 with the City (Department of Parks) for the construction of a playground adjacent to the Wingate High School, located on West Kingston Avenue, Borough of Brooklyn, New York, for the contract price of \$356,428.00, subject to unit prices for certain elements of construction.

7. As a condition of the execution of the aforementioned contract, Acme Cassa was required to and did deliver to the City, a certain performance bond executed by New Hampshire, as surety, on behalf of Acme Cassa, as principal, in favor of the City, as obligee, in the penal amount of \$356,428.00, and a payment bond executed by New Hampshire, as surety, on behalf of Acme Cassa, as principal, in favor of the City, as obligee, in the penal amount of \$356,428.00.

8. To induce New Hampshire to become surety for Acme Cassa, it executed a certain written agreement dated June 21, 1956, a copy of which is annexed hereto as Exhibit "A" and incorporated herein as though fully set forth at length.

9. Acme Cassa entered upon the performance of the work required under its agreement with the City and pur-

Order to Show Cause and Petition

suant thereto, from time to time, submitted requisitions for partial payment of moneys due for work performed and was paid the sum of \$246,071.10.

10. Acme Cassa, because of financial difficulties, became unable to proceed to complete the work required to be performed by it; and demand was made upon petitioner, New Hampshire, as surety, to complete the work and to pay various unpaid suppliers of labor and material for work and material supplied by them in connection with the prosecution of the work required to be performed.

11. Upon information and belief, on November 1, 1957, a Notice of Lien for various taxes totalling \$16,126.16 claimed to be due from Acme Cassa together with a Notice of Levy dated October 17, 1957, bearing No. B-970 was caused to be filed by respondent Thomas E. Scanlon, District Director of Internal Revenue, in the appropriate office of the respondent City.

12. Upon information and belief, on November 1, 1957, a Notice of Lien for various taxes totalling \$23,452.83 claimed to be due from Acme Cassa together with a Notice of Levy dated October 27, 1957, bearing No. B-978 was caused to be filed by respondent Thomas E. Scanlon, District Director of Internal Revenue, in the appropriate office of the respondent City.

13. Upon information and belief, on March 4, 1958, a Notice of Lien for various taxes totalling \$13,437.18 claimed to be due from Acme Cassa together with a Notice of Levy dated February 21, 1958, bearing No. B-1241 was caused to be filed by respondent Thomas E. Scanlon, District Director of Internal Revenue, in the appropriate office of the respondent City.

Order to Show Cause and Petition

14. Upon information and belief, on May 21, 1958, a Notice of Lien for various taxes totalling \$9,250.20 claimed to be due from Acme Cassa together with a Notice of Levy dated May 20, 1958 (no number) was caused to be filed by respondent Thomas E. Scanlon, District Director of Internal Revenue, in the appropriate office of the respondent City.

15. New Hampshire, in exoneration of its responsibility as surety under the aforementioned payment and performance bonds, in accordance with the demand made upon it, has paid to suppliers of labor and material within the coverage of its payment bond, and for completion of the work required to be performed under its performance bond, the sum of \$82,990.17 as at November 25, 1958.

16. Since January 7, 1958, the City had available for delivery to New Hampshire its warrant bearing No. 29520 in the sum of \$68,015.50 which it is willing to deliver to New Hampshire, except for the restraint imposed on it by law by the four Notices of Levy heretofore referred to.

17. The respondent City by its Treasurer has refused to deliver the aforesaid warrant No. 29520 in the amount of \$68,015.50, and New Hampshire is informed and believes will refuse to deliver the warrant for the final payment in the amount of \$35,936.80 because of the adverse claims thereto asserted by the respondent, Thomas E. Scanlon, as District Director of Internal Revenue under all of the aforementioned Notices of Levy.

18. New Hampshire is informed and believes that there was paid on account of the aforementioned Tax indebtedness due from Acme Cassa, various sums, so that the

Order to Show Cause and Petition

present unpaid balance due under the aforementioned Notices of Levy is approximately \$35,000.00, inclusive of accruing interest.

19. Plaintiff is informed and believes that in addition to the aforesaid sum of \$68,015.50, there is also available for delivery by City, the sum of \$15,021.00 due to the respondent Acme Cassa, or its surety Aetna Casualty and Surety Company, in connection with other work, which the City refuses to pay by reason of the adverse claim of the respondent, Thomas E. Scanlon, as District Director of Internal Revenue under the aforementioned Notices of Levy.

20. New Hampshire by reason of its position as a completing surety for Acme Cassa or by reason of the written assignment executed by Acme Cassa, annexed hereto as Exhibit "A" is entitled to receive the warrant in the amount of \$68,015.50 free of the claim of the liens asserted by Thomas E. Scanlon, as District Director of Internal Revenue under any of the aforescribed Notices of Levy.

21. Heretofore, on January 21, 1959 pursuant to § 6325 (b) (2) (B) of the Internal Revenue Code of 1954, petitioner made application for the partial discharge from the liens heretofore referred to of the sum of \$28,515.50 of the sum of \$68,015.50 being the amount of the warrant of the City of New York, available for delivery to New Hampshire.

22. The aforementioned Application was granted and on or about February 3, 1959, respondent Thomas E. Scanlon forwarded to the Treasury of the City of New York, his written consent to the payment of the sum of \$28,515.50

Order to Show Cause and Petition

from the total of \$68,015.50 represented by the aforementioned warrant No. 29520.

WHEREFORE, New Hampshire Fire Insurance Company prays that the Notices of Levy described herein, heretofore served and filed upon the respondent City of New York be quashed insofar as they restrain and prohibit the payment by respondent City of New York to New Hampshire Fire Insurance Company of the sum of \$68,015.50 or in the alternative, that the aforementioned Notices of Levy be quashed, insofar as they restrain and prohibit payment by respondent City of New York of all sums in excess of the amount due and owing by Acme Cassa, Inc. to the respondent Thomas E. Scanlon, District Director of Internal Revenue.

Dated, New York, N. Y.
March 4th, 1959

ENGELMAN AND HART

By MYRON ENGELMAN
A member of the firm
Attorneys for Petitioner
Office & P. O. Address
10 East 40th Street
Borough of Manhattan
City of New York.

Order to Show Cause and Petition

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK

NEW HAMPSHIRE FIRE INSURANCE
COMPANY,*Petitioner,*

—against—

THOMAS E. SCANLON, District Director of
Internal Revenue, CITY OF NEW YORK,
and ACME CASSA, INC.,*Respondents.*STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MYRON ENGELMAN, being duly sworn, deposes and says:—

I am a member of the firm of Engelman and Hart, attorneys for petitioner and I am fully familiar with the facts. I am an attorney at law, and make this affidavit in conformity with Rule 10(b) of the General Rules of the United States District Court for the Southern District of New York.

No previous application for the relief sought by the annexed order to show cause and petition has been heretofore made.

(Sworn to by Myron Engelman on March 4, 1959.)

**Affidavit in Opposition to Motion to Quash Notices
of Levy**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NEW HAMPSHIRE FIRE INSURANCE
COMPANY,

Petitioner,

—against—

THOMAS E. SCANLON, District Director of
Internal Revenue, CITY OF NEW YORK,
and ACME CASSA, INC.,

Respondents.

Civ. 143-306

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK

} ss.:

Sherman J. Saxl being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the Office of Arthur H. Christy, United States Attorney for the Southern District of New York and as such I am familiar with the above captioned matter.

2. This affidavit is submitted in opposition to petitioner's motion to quash the notice of levy number B-970, dated October 16, 1957, the notice of levy number B-978, dated October 23, 1957, the notice of levy number B-1241, dated February 21, 1958, the notice of levy (no number) dated May 20, 1958, heretofore served upon and filed with respondent City of New York at various times between November 1, 1957 and May 21, 1958.

Affidavit in Opposition to Motion to Quash Notices of Levy

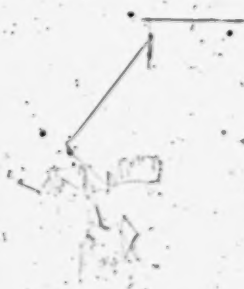
3. On information and belief, the respondent, Thomas E. Scanlon, is a Government official who has his office and official place of business at 210 Livingston Street, Brooklyn 1, N. Y. in the Eastern District of New York.

4. No summons and complaint has ever been served upon the United States Attorney for the Southern District of New York and upon information and belief, no summons and complaint has ever been served upon the Attorney General of the United States, or upon Thomas E. Scanlon, the respondent herein.

5. No action has been taken by the United States to reduce to possession the funds against which the above mentioned liens have been filed.

6. On information and belief, Acme Cassa, Inc. assigned all of its rights to payment from the City of New York to the petitioner herein, on February 24, 1959, and said assignment was approved by the Department of Parks on February 25, 1959 and was filed with the Comptroller's Office of the City of New York, on March 3, 1959.

(Sworn to by Sherman J. Saxl on March 30th, 1959.)



Affidavit of A. Foreman**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK****NEW HAMPSHIRE FIRE INSURANCE
COMPANY,***Petitioner,**—against—***THOMAS E. SCANLON, District Director of
Internal Revenue, CITY OF NEW YORK;
and ACME CASSA, INC.,***Respondents:***STATE OF NEW YORK
COUNTY OF NEW YORK****{ ss. :**

Albert Foreman, being duly sworn, deposes and says:

I am a member of the firm of M. Carl Levine, Morgulas & Foreman, attorneys for Acme Cassa, Inc., one of the respondents above named, and am fully familiar with the facts:

I am authorized to advise the Court that our client, Acme Cassa, Inc., has no objection to the granting of the motion of the New Hampshire Fire Insurance Company.

(Sworn to by Albert Foreman on April 1, 1959.)

Opinion Dismissing Petition**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK****NEW HAMPSHIRE FIRE INSURANCE
COMPANY,***Petitioner,**—against—***THOMAS E. SCANLON, District Director of
Internal Revenue, CITY OF NEW YORK,
and ACME CASSA, INC.,***Respondents.*

Ci. 143-306

CASHIN, D. J.

This is a summary proceeding brought on by petition and order to show cause seeking to have quashed, at least in part, notices of levy served and filed upon respondent City of New York by respondent Thomas E. Scanlon, a District Director of Internal Revenue. The petitioner asserts a right prior to that of the Director to funds in the hands of the City of New York due and owing under a construction contract between respondent Acme Cassa, Inc. and the City. The petitioner alleges expenditures, under the payment and performance bonds, of \$82,990.17 as of November 25, 1958. There is admittedly due and owing by the City under the contract at the present time and the sum of \$68,015.50, and there is soon to be due and owing the further sum of \$35,936.80. Neither the City nor Acme Cassa, Inc. interpose any objection to the relief sought.

Opinion Dismissing Petition

I am in agreement with the contention of the Government that the District Court has no jurisdiction to determine the respective rights of the petitioner and the Government to the funds in the hands of the City in a summary proceeding. Petitioner argues that the provisions of 28 U. S. C. A. § 2463 give the Court such jurisdiction. That Section reads as follows:—

“All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.”

The petitioner argues that the notices of levy filed with the City have the effect of “detaining” the funds. Since they are so detained, this argument goes on, the funds are “in the custody of the law” and thus subject to the order of the Court.

For the purposes of this motion I will assume that the funds have been detained within the meaning of Section 2463 (cf. *Seattle Association of Credit Men v. U. S.* (9 Cir. 1957) 240 F. 2d 906). Despite this assumption I feel that this summary proceeding does not lie in view of the authority of *In Re Behrens* (2 Cir. 1930) 39 F. 2d 561 and *Goldman v. American Dealers Service* (2 Cir. 1943) 135 F. 2d 398. Both of these cases considered the availability of summary proceedings under the then Title 28 U. S. C. A. § 747, which Section has been recodified in *hac verba* in the present 28 U. S. C. A. § 2463. In both cases it was held that despite the fact that tangible personal property seized under revenue laws was thus in the custody of the law, summary proceedings for its recovery would not lie. It is true that in both those cases the parties from whom the seizure took place were also the parties who were allegedly liable to the Gov-

Opinion Dismissing Petition

ernment and that, here, the petition is brought on by a third party. However, I cannot see where this distinction is one of substance. If Section 2463 brings the property within the custody of the law so as to make a summary proceeding for a turn-over order available, there would appear to be no more authority to allow proceedings to be brought by an owner from whom it was not seized than by an owner from whom it was. To the extent that *Raffaele v. Granger* (3 Cir. 1952) 196 F. 2d 620, and *Rothensies v. Ullman* (3 Cir. 1940) 110 F. 2d 590, hold contrary, I decline to follow them. In both the *Behrens* and *Goldman* cases, *supra*, the Court held that the denial of the relief sought should be conditioned on the Government instituting proper proceedings to test the merits of the controversy seasonably. No such condition is necessary in denying the instant application because the petitioner itself can institute a plenary suit for the recovery of the property if it so chooses.

The petition is dismissed.

It is so ordered.

Dated: New York, N. Y.

April 16th, 1959.

JOHN W. CASHIN
United States District Judge

Judgment entered

HERBERT A. CHARLSON

4°16 59

Clerk

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 339—October Term, 1958.

(Argued June 10, 1959)

Decided June 22, 1959.)

Docket No. 25635

NEW HAMPSHIRE FIRE INSURANCE COMPANY,

Petitioner-Appellant;

—v—

THOMAS E. SCANLON, District Director of Internal Revenue,
CITY OF NEW YORK and ACME CASSA, INC.,

Respondents-Appellees.

Before

HINCKS and MOORE, *Circuit Judges*, and
SMITH, *District Judge*.

The United States District Court for the Southern District of New York, John W. Cashin, *Judge*, held that it had no jurisdiction under Title 28, U. S. C. A., section 2403, in summary proceedings to vacate notices of levy filed by respondent Director of Internal Revenue against an alleged debtor of a taxpayer. The petitioner appealed. *Affirmed*.

JACK HART, of Engelman and Hart, New York,
N. Y. (Engelman and Hart, New York,
N. Y., on the brief), *for appellant*.

WILLIAM ELLIS, Asst. U. S. Atty., S. D. N. Y.,
New York, N. Y. (S. Hazard Gillespie, Jr.,
U. S. Atty., and Sherman J. Saxl, Asst.
U. S. Atty., S. D. N. Y., New York, N. Y.,
on the brief), for *Thomas E. Scanlon*, re-
spondent-appellee.

PER CURIAM:

Upon the opinion of Judge Cashin, D. C. S. D. N. Y.,
April 16, 1959, [172] F. Supp. [392], the order is affirmed.

[fol. 19]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW HAMPSHIRE FIRE INS. COMPANY, Petitioner-Appellant

-v-

THOMAS E. SCANLON, Dist. Dir. of Internal Revenue, CITY
OF NEW YORK and ACME CASSA, Inc., Respondents-Appellees

JUDGMENT—June 22, 1959

Appeal from the United States District Court for the
Southern District of New York.This cause came on to be heard on the transcript of
record from the United States District Court for the South-
ern District of New York, and was argued by counsel.On Consideration Whereof, it is now hereby ordered,
adjudged, and decreed that the order of said District
Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk

[fol. 20]

[File endorsement omitted]

[fol. 21]

Clerk's Certificate to foregoing transcript comit
ted in printing).

SUPREME COURT OF THE UNITED STATES

No. 339, October Term, 1959.

NEW HAMPSHIRE FIRE INSURANCE Co., Petitioner,

v.

SCANLON, District Director of Internal Revenue, et al.
)

ORDER ALLOWING CERTIORARI—November 9, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.